No. 2809

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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UNITED STATES OF AMERICA,

*Plaintiff in Error.*

vs.

WILLARD N. JONES,

*Defendant in Error.*

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# TRANSCRIPT OF RECORD

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Upon Writ of Error to the District Court of the United States for the District of Oregon.

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SWEENEY, VARNEY & STRAUB, PRINTERS, PORTLAND

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# INDEX

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States of America,

*Plaintiff in Error,*

*vs.*

Willard N. Jones,

*Defendant in Error.*

## NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD:

Mr. Clarence L. Reames, United States Attorney, and Mr. Barnett H. Goldstein, Assistant United States Attorney, Post Office Building, Portland, Oregon, for the Plaintiff in Error.

Fulton & Bowerman, Yeon Building, Portland, Oregon, and Schwartz & Saunders, Lewis Building, Portland, Oregon, for the Defendant in Error.

## CITATION ON WRIT OF ERROR

United States of America,
District of Oregon—ss.

To Willard N. Jones, defendant; Fulton and Bowerman, and Schwartz and Saunders, attorneys for the said defendant,

Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 24th day of May in the year of our Lord, one thousand, nine hundred and sixteen.

R. S. BEAN, Judge.

United States of America,

District of Oregon—ss.

Due service of the foregoing Citation on Writ of Error, by receipt of a copy thereof duly certified to by Barnett H. Goldstein, Assistant United States Attorney for the District of Oregon, and attorney for the plaintiff herein, together with a like certified copy of a Petition for Writ of Error, Order allowing writ of error, Assignment and Writ of Error, is hereby admitted in Portland, Oregon, this 24th day of May, 1916.

C. W. FULTON,

Attorney for Defendant and Defendant in Error.

Filed May 25, 1916.

G. H. Marsh, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,

WRIT OF ERROR.

*Plaintiff in Error,*

*vs.*

WILLARD N. JONES,

*Defendant in Error.*

The United States of America, ss.

The President of the United States of America,

To the Judge of the District Court of the United States for the District of Oregon:

Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton one of you, between United States of America, Plaintiff and Plaintiff in Error, and Willard N. Jones, Defendant and Defendant in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States this 25th day of May, 1916.

(Seal)

G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck, Deputy.

Service of the above Writ of Error made this 25th day of May, 1916, upon the District Court of the United States, for the District of Oregon, by filing with me as Clerk of said Court, a duly certified copy of said Writ of Error.

G. H. MARSH,

Clerk, United States District Court, District of Oregon.

By F. L. Buck, Deputy.

Filed May 25, 1916. G. H. Marsh, Clerk, United States District Court, District of Oregon.

*In the District Court of the United States for the District of Oregon.*

March Term, 1912.

BE IT REMEMBERED, That on the 11th day of June, 1912, there was duly filed in the District Court

of the United States for the District of Oregon, a Complaint, in words and figures as follows, to-wit:

## COMPLAINT.

*In the District Court of the United States for the District of Oregon.*

United States of America,

*Complainant,*

*vs.*

Willard N. Jones,

*Defendant.*

Comes now the United States of America by John McCourt, United States Attorney in and for the District of Oregon, pursuant to the direction and authority of the Attorney General of the United States, and complains of the defendant Willard N. Jones, and alleges as follows:

### I.

That the lands hereinafter described, together with a large area of other lands, were prior to the 16th day of May, 1895, a part of and included within the limits and boundaries of the Siletz Indian Reservation in the State of Oregon; that theretofore, on or about the 31st, day of October, 1892, certain articles of cession and agreement were made and concluded at the Siletz Agency in the State of Oregon, by and between the

United States of America and the Alsea and other Indians in the said Siletz Reservation, whereby said Alsea and other Indians, for the consideration therein mentioned, ceded and conveyed to the United States of America, all their claim, right, title and interest in and to all the unallotted lands within the limits of said reservation, except five sections of land described in Article IV of said agreement, none of which lands so excepted are or were included within the lands hereinafter described. The lands hereinafter described were among the unallotted lands above mentioned and among the lands opened to settlement and entry as hereinafter alleged.

II.

That thereafter on the 15th day of August, 1894, the Congress of the United States duly and regularly passed an act entitled,

> "An Act making appropriations for current and contingent expenses of the Indian Department in fulfilling treaty stipulations with various Indians tribes for the fiscal year ending June 30, 1895, and for other expenses."
>
> 28 Stats. L. 286-326.

That in and by said last mentioned Act of Congress, said articles of cession and agreement between the Alsea and other Indians in said Siletz Reservation and the

United States, hereinabove mentioned, was accepted, ratified and confirmed and provision was made for disposition of said ceded lands by the United States as follows:

> "The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law, under the town-site law and under the provisions of the homestead law; provided, however, that each settler under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent."

It was further provided, in and by said act that immediately after the passage thereof, the Secretary of the Interior should, under such regulations as he might prescribe, open said lands to settlement, after proclamation by the President and sixty days' notice; that thereafter on the 16th day of May, 1895, the President of the

United States by proclamation, duly and regularly given and made, opened said ceded lands to settlement, on and after the 25th day of July, 1895, under the terms of and subject to all the conditions, limitations, reservations and restrictions contained in said agreement, the statute hereinbefore mentioned and referred to and the laws of the United States applicable thereto.

III.

That thereafter on the 17th day of May, 1900, the Congress of the United States, duly and regularly passed and adopted an act entitled,

> "An Act providing for free homesteads on the public lands by actual bona fide settlers, and reserving the public lands for that purpose,"

in and by which said act it was provided that all settlers, under the homestead laws of the United States upon the public lands which have already been opened to settlement, acquired prior to the passage of said act by authority or agreement from the various Indian tribes, who have resided or who shall hereafter reside upon the tract entered in good faith, for the period required by the existing law, shall be entitled to a patent for the land so entered, upon the payment to the local land officers of the usual and customary fees and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent to the lands covered by his entry.

IV.

That on or about August, 1900, the defendant, Willard N. Jones, with a view to and the intention of acquiring title in himself and persons associated and interested with him, to the lands hereinafter described, together with a large quantity of other lands ceded and opened to settlement under the homestead laws as hereinbefore set forth, caused a large tract thereof, including the lands hereinafter described, to be cruised for the purpose of ascertaining the quantity of timber standing thereon, all of said lands being then and there heavily timbered and very valuable for the timber thereon.

V.

That on and between the 15th day of August, 1900, and the 25th day of February, 1901, the said defendant, Willard N. Jones, designing and intending to deceive the officers of the United States having authority relating to and over the public lands of the United States, and to defraud and cheat complainant out of the title, use and possession of a large portion of its unappropriated public lands open to settlement and entry under the homestead laws as aforesaid, by means of soliciting and procuring persons qualified to make homestead entries of said lands, to make false and fraudulent and collusive homestead entries upon portions of said ceded land then unappropriated, did on and between the above men-

tioned dates, solicit and procure the hereinafter named persons, together with a large number of other persons to make in the manner and form prescribed by law, homestead applications and affidavits at the United States Land Office therein at Oregon City, Oregon, but now at Portland, Oregon, for the lands hereinafter specifically described, together with others of said lands.

VI.

That the persons, among others wrongfully and unlawfully solicited and procured by the defendant, Willard N. Jones, to make homestead applications, affidavits and entries as aforesaid, together with the date of the affidavit and application of each to enter the same, the number of the said application and the description of the lands entered and applied for, are as follows:

BENJAMIN S. HUNTER,

Date of Affidavit and Application, October 9, 1900,

Homestead Application No. 13135,

South Half of Northwest Quarter, Southwest Quarter of Northeast Quarter, and Northwest Quarter of Southwest Quarter of Section 13, Township 9 South, Range 10, West Willamette Meridian.

OLIVER I. CONNOR,

Date of Affidavit and Application, October 6, 1900,

Homestead Application No. 13116, for

Southeast Quarter of Northeast Quarter and Northeast Quarter of Southeast Quarter, Section 4, and Southwest Quarter of Northwest Quarter and Lot 4, Section 3, Township 9 South, Range 10 West Willamette Meridian.

WILLIAM TEGHTMEIER,

Date of Affidavit and Application, February 25, 1901,

Homestead Application No. 13396, for

South Half of Northeast Quarter and North Half of Southeast Quarter of Section 10, Township 9 South, Range 10, West Willamette Meridian;

RICHARD D. DEPUE,

Date of Affidavit and Application, October 5, 1900,

Homestead Application No. 13113, for

North Half of Southwest Quarter, Southeast Quarter of Southwest Quarter and Southwest Quarter of Southeast Quarter of Section 3, Township 9 South, Range 10, West Willamette Meridian;

JOSEPH GILLIS,

Date of Affidavit and Application, October 1, 1900,
Homestead Application No. 13088, for

Lots 1, 2, 3 and 4, Section 4, Township 9 South, Range 10 West Willamette Meridian;

THOMAS JOHNSON,

Date of Affidavit and Application, October 1, 1900,

Homestead Application No. 13089, for

West Half of Southwest Quarter, Southeast Quarter of Southwest Quarter of Section 14, and Northeast Quarter of Northwest Quarter of Section 23, Township 9 South, Range 10, West Willamette Meridian;

JOHN L. WELLS,

Date of Affidavit and Application, October 1, 1900,

Homestead Application No. 13090, for

South Half of Southeast Quarter, and Lots 1 and 2 of Section 10, and Northeast Quarter of Northeast Quarter of Section 15, Township 9 South, Range 10, West Willamette Meridian;

EDWARD C. BRIGHAM,

Date of Affidavit and Application, October 9, 1900,

Homestead Application No. 13137, for

Southeast Quarter of Southeast Quarter of Section 14, and South Half of Southwest Quarter and Northeast Quarter of Southwest Quarter of Section 13, Township 9 South, Range 10 West Willamette Meridian;

ANTHONY GANNON,

Date of Affidavit and Application, October 1, 1900,

Homestead Application No. 13087, for

East Half of West Half of Section 11, Township 9 South, Range 10, West Willamette Meridian;

## VII.

That all of said lands hereinbefore described and entered and applied for as aforesaid at the United States Land Office at Oregon City, Oregon, were at the time of said applications and entries, vacant, unappropriated, non-mineral, public lands of the United States, subject to homestead entry as hereinbefore set forth, and at the time the said defendant, Willard N. Jones, solicited and procured the said above named persons and each of them to apply for and enter said lands, and before the filing of said applications and entries respectively, under the homestead law, he prevailed upon and induced each of said entrymen to subscribe or assent to a written document or instrument substantially in words and figures as follows:

> "That whereas, the party of the first part is entitled to the benefits of the Act of Congress of June 8th, 1872, (Sec. 2304 R. S.) giving homesteads to honorably discharged soldiers and sailors, and desires to avail himself of the privileges therein granted by taking a homestead, and the party of the second part is in possession of information relative to the existence of public lands within the State of Oregon subject to such entry;

Now, therefore, the party of the second part, in consideration of the covenants and agreements on the part of the party of the first part hereinafter stipulated to be kept and performed, hereby agrees to give to the party of the first part, information which will enable him to locate and file a homestead upon 160 acres of the public lands of the United States, situated within the State of Oregon, and the party of the first part hereby agrees to pay to the party of the second part as compensation for such services and information, and for his services to be performed in the preparation of the papers and affidavits necessary in making such filing the sum of $185.00, to be paid in the manner and at the time hereinafter designated.

*The party of the first part further agrees to comply with the laws of the United States in regard to residence upon said lands taken as a homestead,* and agrees to employ and does hereby employ the party of the second part to build a house upon the land to be taken as a homestead, and agrees to pay to the said party of the second part therefor, the sum of $100.00 to be paid in the manner and at the time hereinafter designated, and also to clear and cultivate the land to be taken up under this agreement, or so much thereof as is required and for the time required

by the laws of the United States in order to perfect title thereto, and to pay the said party of the second part therefor the sum of $175.00, to be paid at the time and in the manner hereinafter designated. The said party of the second part hereby accepts such employment, and agrees to do and perform or to cause to do and performed all work and labor necessary to be done and performed upon said premises in order to comply with the laws of the United States.

The party of the second part hereby agrees to advance to the party of the first part, *if required,* the amount of fees required at the land office in order to make and perfect such filing, and all necessary expenses of the party of the first part in connection therewith, not to exceed the sum of $60.00, and the party of the first part agrees to repay to the party of the second part all sums so advanced at the time and in the manner hereinafter designated.

The party of the second part further agrees that after final proof shall have been made upon said claims, he will, *at the option of the party of the first part,* procure for the party of the first part a loan not to exceed the sum of $720.00, to be secured by a first mortgage upon said claim, and immediately upon procurement of such loan

all sums of money herein stipulated to be paid to the party of the second part by the party of the first part, together with all sums of money advanced by the party of the second part to the party of the first part under this agreement shall become due and payable, and shall be paid out of the loan so secured; and it is further understood by and between the parties hereto that the payment by the party of the first part to the party of the second part of all sums of money hereinbefore designated shall be conditional upon the procurement by the party of the second part of the loan hereinbefore mentioned, *if the same shall be required.*

In case the party of the first part shall not wish to avail himself of the loan hereinbefore mentioned, then, and in that event, all moneys advanced to the party of the first part by the party of the second part under this agreement, together with all sums of money hereby agreed to be paid to the party of the second part by the party of the first part shall become due and payable as soon as final proof shall have been made upon said claim. And the party of the first part hereby agrees to make said final proof as soon as the laws of the United States have been complied with, (in regard to residence and cultivation.)"

"Witness our hands the year and day first above written."

## VIII.

That in and by said instrument and document above mentioned, to which he induced and persuaded each of said entrymen to subscribe or assent, the said defendant, Willard N. Jones, intended to conceal his design and intention to acquire title to the lands which were entered and applied for by the said entrymen as aforesaid, and to conceal the fact that it was the intention and purpose as hereinafter set forth, of the said defendant, Willard N. Jones, and said entrymen, to retain the then places of residence of each of said entrymen, and that it was not intended by the said Willard N. Jones or any of said entrymen, to reside upon or make their home upon the lands entered and applied for by them, as required by law, before the issuance of patent thereto; that all of said entrymen at the time of their said applications and entries, resided in Portland, Multnomah County, Oregon, except the entryman Benjamin S. Hunter, who then resided in Dundee, Yamhill County, Oregon, and neither the said Willard N. Jones or any of said entrymen at the time of making said applications and entries, or at any other time, intended to establish a residence upon the lands entered by said entrymen respectively, or to reside thereon; and the said Willard N. Jones at the time of said applications and entries and

each of them, well knew and each of said entrymen well knew, that none of said entrymen intended to establish a residence upon the lands entered or to be entered by them respectively, or to reside thereon during the life of their respective homestead entries.

## IX.

That it was further wrongfully and fraudulently intended and designed by the said Willard N. Jones, at and prior to said application and entries aforesaid, and thereafter during the life of the said homestead entries respectively, that each of said entrymen should falsely make proof before the officers of the United States having authority relating to and over the public lands, and in the form prescribed by law to the effect, among other things, that each of said entrymen had established a residence upon the lands entered by him respectively, and had resided continuously thereon for the length of time prescribed by law, and that each of said entrymen had reduced to cultivation and cultivated a substantial portion of said lands, and that they had made substantial improvements thereon, when, in truth and in fact, as the said Willard N. Jones well knew, none of said entrymen would at the time of making said proof, have established a residence upon the lands entered by him, nor resided thereon, and would not have cultivated any part thereof nor have made any improvements thereon.

X.

That thereafter, in order to carry out the said fraudulent intention and design to acquire title to said lands and to procure said entrymen to make false, fraudulent and collusive applications, affidavits, entries and proofs as aforesaid, and pursuant to the fraudulent and collusive understanding and agreement entered into between the said Willard N. Jones and each of said entrymen and applicants, the said Willard N. Jones caused notice to be given as required by law, of the intention of the respective entrymen to make homestead proofs on the lands embraced in their respective entries; that thereafter, each of said entrymen offered and made homestead proof in the form prescribed by law and submitted the same to the officers of the United States land office at Oregon City, Oregon, upon the following dates:

| Entrymen | Date of Proof. | Date and No. of Final Certificate | |
|---|---|---|---|
| do and perform or to cause to done and per- | | | |
| Benjamin S. Hunter | 12-23-01 | 12-23-01 | 6477 |
| William Teghtmeier | 5-26-02 | 5-26-02 | 6525 |
| Richard D. Depue | 11-25-01 | 11-25-01 | 6457 |
| Joseph Gillis | 11- 4-01 | 11- 4-01 | 6443 |
| Thomas Johnson | 11- 4-01 | 11- 9-01 | 6446 |
| John L. Wells | 5-26-02 | 5-26-02 | 7427 |
| Edward C. Brigham | 12-23-01 | 12-23-01 | 6476 |
| Anthony Gannon | 11-25-01 | 11-25-01 | 6458 |

That each of said entrymen, in conformity with said notices of intention to make proof above mentioned, and pursuant to their respective intentions to make false, fraudulent and collusive homestead applications, affidavits and entries and proofs thereon as aforesaid, offered and made homestead proof and submitted the same to the officers of the United States Land Office at Oregon City, Oregon, at the dates above set forth; that in and by said homestead proof, each of said entrymen by himself and two witnesses falsely and fraudulently represented that he had as required by law, established a residence upon and resided upon the land embraced in his said entry continuously after the alleged establishment of residence thereon until the time of said proofs, and had made substantial improvements thereon as set forth in said proof; that he had been only temporarily absent from said lands for a short time for the purpose of earning money to improve the same, and those entrymen having families, each further falsely gave proof by himself and witnesses that his family resided on the claim in the absence of the entryman; that he had cultivated that portion of said lands specifically set out in his said proof and that he had not conveyed any part of said lands and had not made any contract directly or indirectly, whereby the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself; and that he was acting in good

faith in perfecting the entry, when in truth and in fact, as each of said entrymen and his witnesses then and there well knew at the time of making said proofs, had not established a residence upon said lands and had never resided thereon and had no improvements thereon, and none of the said entrymen as they and their witnesses well knew, had cultivated that part of his said entry set forth in his homestead proof, or any part thereof, for the time set forth in said proof or at any time, but if any part of any of said homestead entries was cultivated, the same was done by the defendant, Willard N. Jones, and all improvements made thereon was made by the defendant, Willard N. Jones, and not by any of said entrymen; and plaintiff alleges that none of said entrymen had acted in good faith or was acting in good faith in perfecting said entry, but was making the same upon speculation and not for the purpose of making or securing for himself or his family, a home; that in truth and in fact, all of said entrymen after the making of their respective entries as aforesaid, continued at all times during the life of their respective entries, to reside at Portland, Oregon, except Benjamin S. Hunter, who resided at all said times at Dundee, Oregon, as aforesaid; that no improvements were made upon any of said lands during the life of said homestead entries, with the exception that the said defendant, Willard N. Jones, for the purpose of falsely and fraudulently making it appear that each of said entrymen resided upon his respective

entry, had a house thereon built, a small, flimsy, uninhabitable shack upon the lands within each of said entries, shortly before said proofs were made;

And the said Willard N. Jones, also in furtherance of said fraudulent and collusive purpose, caused a small tract upon each of said entries, in extent less than an acre, to be scratched over in order to give a semblance of a foundation for the statements of the entrymen and their witnesses that a portion of their respective entries had been cultivated.

XI.

That the defendant, Willard N. Jones, paid to the officers of the United States, all sums of money as fees and otherwise, exacted of the several entrymen above named, and furnished proof witnesses and their expenses, in connection with their said entries, and the same was paid and said proofs made, for the purpose of defrauding the United States out of the lands embraced in said respective entries, and the said Willard N. Jones knowingly induced and procured each of said entrymen to make said false and fraudulent proofs aforesaid and paid all the expenses of each in relation thereto and connected with said entries;

That the land officers of the United States at Oregon City, Oregon, being ignorant of the false and fraudulent representations made by the said entrymen in their respective homestead proofs and having no

means of ascertaining the truth thereof, upon the receipt of said sums of money as fees and upon the purchase price for said lands, the same being furnished and paid by the defendant, Willard N. Jones, and upon the submission of the said proofs, issued certificates to each of said entrymen to the effect that upon presentation thereof to the Commissioner of the General Land Office, the entrymen named therein would be entitled to receive a patent for the land described in his homestead entry; that the dates and numbers of the final certificates so issued are as set forth in paragraph X. hereof:

That shortly after submission of final proof upon said homestead entries as hereinbefore set forth, and the issuance of said final certificates, each of said entrymen executed a mortgage to the defendant, Willard N. Jones and received a sum of money from him in conformity with the instrument to which each of said entrymen subscribed or assented, as set forth in paragraph VII hereof.

XII.

That thereafter, the officers of the United States Land Office at Oregon City, Oregon, transmitted to the General Land Office of the United States, the papers and testimony relating to each of said homestead applications, entries and proofs; and thereafter, notwithstanding the facts hereinbefore mentioned and set forth, the President of the United States and the

officers of the Department of the Interior and the General Land Office of the United States, being ignorant of the false and fraudulent character thereof as above set forth, and having no means of ascertaining the same, did issue to each of said applicants and entrymen, a patent purporting to convey to the respective applicants and entrymen, the land described in their respective applications and entries and upon the dates following:

| Entryman. | Date. |
|---|---|
| Benjamin S. Hunter | September 26, 1902 |
| Oliver I. Connor | December 30, 1902 |
| William Teghtmeier | May 19, 1903 |
| Richard D. Depue | December 30, 1902 |
| Joseph Gillis | December 30, 1902 |
| Thomas Johnson | September 26, 1902 |
| John L. Wells | October 12, 1903 |
| Edward C. Brigham | June 8, 1903 |
| Anthony Gannon | June 8, 1903 |

XV.

That all of the false and fraudulent representations made by the several entrymen and their witnesses as hereinbefore set forth, were made with the knowledge and at the solicitation of the said defendant, Willard N. Jones, and with the intent to deceive and defraud the United States out of the use of, title to and possession of the lands hereinbefore described, and the complainant relied upon the false and fraudulent representations so

made as aforesaid, and was deceived and defrauded thereby, and by reason of such false and fraudulent representations and unlawful, collusive and corrupt agreement and understanding between said entrymen and the said defendant, plaintiff was wrongfully and unlawfully induced to issue said patents and part with the title to said lands to its damage in the sum of One Hundred Thirty-three Thousand ($133,000) Dollars.

XVI.

That at the time of the applications and entries of said lands and at the time of the issuance of patents therefor as aforesaid, the lands hereinbefore described were of the reasonable aggregate value of Thirty-one Thousand, Four Hundred ($31,400.00) Dollars, and said lands are now of the reasonable aggregate value of the sum of One Hundred Thirty-three Thousand ($133,000.00) Dollars, and by reason of the fraudulent practices and representations, solicited, induced and committed by the said defendant, Willard N. Jones, as aforesaid, and relying upon which, plaintiff was wrongfully induced to issue patents for said lands as hereinbefore alleged, plaintiff was and is damaged in a sum of money equal to the full value of said lands, to-wit, the sum of One Hundred Thirty-three Thousand ($133,000.00) Dollars, and is entitled to recover the same from the defendant, Willard N. Jones.

WHEREFORE, plaintiff demands judgment

against the defendant for the sum of $133,000.00, together with its costs and disbursements incurred herein.

JOHN McCOURT,
United States Attorney.

United States of America,

District of Oregon—ss.

I, John McCourt, being first duly sworn, on oath depose and say that I am United States Attorney for the District of Oregon, and that the facts set forth in the foregoing complaint are true as I verily believe. I base this affidavit of verification upon reports and affidavits submitted and presented to me by the agents and officers of the General Land Office of the United States, the agents and officers of the Interior Department of the United States, and the agents and officers of the Department of Justice of the United States, together with the official report of the evidence taken and given in that certain criminal action against the defendant named in the foregoing complaint involving the matters and transactions set forth therein.

JOHN McCOURT.

Subscribed and sworn to before me this 11th day of June, 1912.
(Seal)

FRANK L. BUCK,
Notary Public for Oregon.

Filed June 11, 1912. A. M. Cannon, Clerk.

And Afterwards, to-wit, on the 13th day of March, 1916, there was duly filed in said Court and cause an Amended Answer, in words and figures as follows, to-wit:

## AMENDED ANSWER.

Comes now the defendant in the above entitled cause, and by this his amended answer filed by leave of Court first had, answering the complaint of the complainant therein, admits, denies and alleges as follows:

I.

Answering paragraph I of said complaint, this defendant admits the same to be true.

II.

Answering paragraph II of said complaint, this defendant admits the allegations thereof to be true.

III.

Answering paragraph III of said complaint, this defendant admits the allegations thereof to be true.

IV.

Answering paragraph IV of said complaint, this defendant denies that on or about August, 1900, or at any time or at all, this defendant, with a view to or with the intention of acquiring title in himself or acquiring title

in himself and persons or any person associated or interested with him to the lands in said complaint described, or any thereof, or to such lands or any thereof together with a large quantity of or any other lands ceded and open to settlement under the homestead laws of the United States, or otherwise or at all, caused a large tract or any thereof, including the lands in the complaint described, or any thereof, to be cruised for the purpose of ascertaining the quantity of timber standing thereon, or otherwise, or at all, and denies that all of said lands were heavily timbered or very valuable for the timber thereon, but admits that some of said lands were heavily timbered.

V.

Answering paragraph V of said complaint, this defendant denies that on or between the 15th day of August, 1900, and the 25th day of February, 1901, or at any time or at all, this defendant, designing and intending, or designing or intending to deceive the officers of the United States having authority relating to or over the public lands of the United States or any of them, or any such officers, or any person or persons, or to defraud or cheat complainant out of the title, use, or possession of a large or any portion of its unappropriated public lands open to settlement and entry under the homestead laws of the United States, or any land whatsoever, or otherwise or at all, by means of soliciting

or procuring persons qualified or otherwise to make homestead entries on said lands or any thereof to make false or fraudulent or collusive homestead entries upon portions or any of said ceded lands then or at any time unappropriated or otherwise or at all, did, on or between the dates last aforesaid, or at any time or at all, solicit or procure the persons named in the said complaint or in paragraph 6 thereof, or any of them, or any other person or persons, to go with a large or any number of other persons or any other persons, or at all, to make homestead applications or affidavits at the United States Land Office at Oregon City, Oregon, or elsewhere, or at all, for the lands in the complaint described or any thereof, or for such lands or any thereof together with any other land or lands.

VI.

Answering paragraph VI of said complaint, this defendant denies that the persons named in said paragraph were or that any of them was, or that the persons in said paragraph mentioned, among others or with others, or with any person or at all, wrongfully or unlawfully solicited or procured by this defendant to make homestead applications, affidavits, or entries as in the complaint alleged, or otherwise, or at all, or to make such or any homestead applications or application, affidavits or affidavit, entries or entry. This defendant believes that the persons named in said paragraph VI on or about

the dates therein mentioned respectively entered as homesteads under said Act of August 15th, 1894, the tracts of land which it is averred in said paragraph VI they entered under the homestead laws, but this defendant denies that he wrongfully or unlawfully solicited or advised or procured said parties or any of them to make such entries.

VII.

Answering paragraph VII of said complaint, this defendant admits that all of the lands in the complaint described were at the time of the applications and entries in the complaint mentioned vacant, unappropriated, non-mineral, public lands, subject to entry as homesteads under the said Act of August 15th, 1894, but this defendant denies that he solicited or procured said persons mentioned in paragraph VI of said complaint, or any of them or any person or persons, to apply for or enter said lands or any thereof, and denies that before the filing of such applications and entries or any of them, or at any time or at all, this defendant prevailed upon or induced each or any of said entrymen to subscribe or assent to a written document, or to the written document or instrument set forth in paragraph VII of said complaint. This defendant, however, admits that a contract, in substance the same as that set forth in said paragraph VII, was entered into between this defendant and said parties respectively in para-

graph VI of said complaint mentioned, under the circumstances and conditions, however, hereinafter in this answer averred, and not otherwise.

VIII.

Answering paragraph VIII of said complaint, this defendant denies that in and by, or in or by said instrument set forth in paragraph VII aforesaid the defendant intended to conceal his design or intention to, and denies that he ever had any design or intention to acquire title to the lands which were entered and applied for by the said entrymen or any thereof, or intended to conceal the alleged fact, and denies that it was a fact that it was the intention or purpose of this defendant and the said entrymen or of this defendant or any of them that said entrymen or any of them should retain the then places of residence of said entrymen, or that any of them should retain his then place of residence, and denies that it was not intended by the defendant or the said entrymen or any of them that said entrymen or any of them should reside upon or make their or his home upon the lands entered and applied for as required by law before the issuance of patent thereto, and denies that neither this defendant nor any of said entrymen at the time of making said applications and entries, or at any time, intended that said entrymen or any of them should not establish a residence upon the lands entered or to be entered by them respectively or to re-

side thereon during the life of their respective homestead entries. This defendant admits that he did not intend to reside upon any of said tracts, but denies that he had any knowledge or information sufficient to form a belief that any of the said entrymen did not intend to reside upon the tract of land entered by him as required by law.

## IX.

Answering paragraph IX of said complaint, this defendant denies that it was further or at all wrongfully or fraudulently intended or otherwise or at all intended or designed by defendant, at or prior to said applications and entries or any thereof or during the life of said homestead entries respectively or any thereof, or at, during or for any time whatever, or at all, that each or any of said entrymen should falsely make proof before the officers of the United States or any thereof having authority relating to or over the public lands, or otherwise, or in the form prescribed by law, or in any form, or at all, that each or any of said entrymen had established a residence upon the lands entered by him respectively or had resided continuously thereon for the length of time prescribed by law or for any time, or that each of said entrymen or any of them had reduced to cultivation or cultivated a substantial portion of said lands or that they or any of them had made substantial improvements thereon, or should make any false proof

or representations respecting said entries whatsoever at any time, and denies that in truth or in fact this defendant well or at all knew at any time that none of said entrymen would at the time of making final proof have established a residence upon the lands entered by him, or knew that in truth or in fact none of said entrymen had resided thereon or would have resided thereon or would not have cultivated any part thereof nor made any improvements thereon; and denies that this defendant ever at any time contemplated, designed, or intended that any of said entrymen should fail or neglect to or would or should not make the required residence, settlement and cultivation on the lands by them respectively entered, or would by any means or in any manner or by any proof falsely or fraudulently represent that they had made the required settlement, residence or improvements when in truth they had not.

X.

Answering paragraph X of said complaint, this defendant denies that in order to carry out said alleged or any fraudulent intention or design to acquire said lands or to acquire title thereto, or to any thereof, or to procure said entrymen or any of them to make false or fraudulent or collusive applications, affidavits, entries or proofs as alleged in said complaint, or otherwise, or pursuant to the alleged fraudulent or collusive, or any fraudulent or collusive understanding or agreement al-

leged in said complaint to have been entered into between this defendant and each or any of said entrymen and applicants or otherwise, or for any fraudulent or wrongful or improper reason, design, motive or purpose whatsoever, or at all, this defendant caused notice to be given as required by law or otherwise of the intention of the respective entrymen to make homestead proofs on the lands embraced in their respective entries, or on any thereof. This defendant is informed that it is true that each of said entrymen made homestead proof in the form prescribed by law and submitted the same to the officers of the United States Land Office at Oregon City, Oregon, on or about the dates alleged in said paragraph X of said complaint. This defendant denies, however, that said entrymen or any of them, pursuant to any intention or intentions to make false or fraudulent or collusive homestead application, affidavit, entry, or proof, offered or made homestead proof or submitted the same to the officers of the United States Land Office at Oregon City, Oregon, or elsewhere, at the dates or any date in said complaint alleged, or at any time or otherwise, or at all. As to whether or not in truth or in fact in or by said alleged homestead proof on any homestead, each of said entrymen, or any of said entrymen, either by himself or by or with two or any number of witnesses, or at all, falsely or fraudulently represented that he had as required by law established a residence upon or resided upon the land embraced in his

said entry continuously after the alleged establishment of residence thereon until the date of said proof, or had made substantial improvements thereon as set forth in said proofs or any thereof, or that he had been only temporarily absent from said lands or any thereof for a short time for the purpose of earning money to improve the same; or as to whether or not said entrymen having families, or any entryman having a family, or otherwise, falsely gave proof by himself and witnesses, or otherwise, or at all, that his family resided on the claim in the absence of the entryman or that he had cultivated that portion of said lands specifically set out in said proof or any thereof, or that he had not conveyed any part of said lands or had not made any contract, directly or indirectly, whereby the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself, or that he was acting in good faith in perfecting the entry when in truth or in fact said entrymen or any of them, or the witnesses or witness of any of them then or there well or at all knew at the time of making said proofs or any thereof that said entrymen or any thereof had not established a residence upon said lands or any thereof or had never resided thereon or had no improvements thereon; or as to whether or not none of said entrymen had not, or knew, or their witnesses or any of them knew or well knew or at all knew said entrymen had not or any of them had not cultivated that

part of his said entry set forth in his homestead proof or any part thereof for the time set forth in said proof or at any time, this defendant denies that he has any knowledge or information sufficient to form a belief, and therefore denies the said allegations and each and every thereof. This defendant denies that if any, or whatever part of said homestead entries was cultivated, the same was done by this defendant, and denies that all or any of the improvements made thereon were made, or any improvement thereon or on any of said lands was made by this defendant, and denies that the improvements on said lands or any thereof were not made by said entrymen; but avers on the contrary that all improvements made on said lands were made by said entrymen and that each entryman made all of the improvements on the land by him entered, and, as defendant believes, made all improvements required by law. This defendant denies that none of said entrymen acted in good faith or was acting in good faith in perfecting his said entry and denies that in making such proofs or making such entries said entrymen or any of them made the same upon speculation and not for the purpose of making or securing for himself and family a home. Denies that in truth or in fact all or any of said entrymen, after making their respective entries as aforesaid, continued at all times or at any time during the life of their respective entries to reside at Portland, Oregon, excepting the said entryman Benjamin S. Hunter, and

denies that during such time said Hunter resided at all times, or any time, or at all, at Dundee, Oregon, or elsewhere than on the land so entered by him. Denies that no improvements were made upon any of said lands during the life of said homestead entries and denies that this defendant for the purpose of falsely or fraudulently making it appear that each of said entrymen or any thereof had resided upon his respective entry or otherwise, had a house built thereon, or a small, flimsy, or uninhabitable, or other shack of house built upon lands within each of said entries, or any thereof, shortly before said proofs or any thereof were made, or at any time or at all. Denies that this defendant in furtherance of said alleged fraudulent and collusive purpose, or otherwise, or at all, caused a small tract or any tract upon each or any of said entries, in extent less than an acre, or otherwise, to be scratched over in order to give a semblance of a foundation for the statements of the entrymen or any of them or their witnesses or any witness, or otherwise, or at all, that a portion of their respective entries had been cultivated.

## XI.

Answering paragraph XI of said complaint, this defendant denies that he paid to the officers of the United States or any of them all or any of the sums of money as fees or otherwise exacted of the several entrymen in the complaint mentioned, or any of them,

and denies that he furnished proof witnesses or any proof witness or provided or paid the expenses of proof witnesses or any thereof in connection with the said entries or any thereof. Denies that said alleged payments or any thereof were made or that said proofs or any thereof were made for the purpose of defrauding the United States out of the lands embraced in said respective entries or any thereof, or any land whatever, and the defendant denies that he knowingly or otherwise, or at all, induced or procured each or any of said entrymen to make said alleged or any false or fraudulent or any proofs, or paid the expenses of each or any entryman or witness in relation thereto or connected with said or any of said entries. This defendant believes it is true, and therefore he does not deny that the land officers of the United States at Oregon City issued certificates to each of said entrymen to the effect that upon presentation thereof to the Commissioner of the General Land Office the entryman therein named would be entitled to receive a patent to the land described in his homestead entry; and this defendant does not deny that the said land officers of the United States at Oregon City, Oregon, were ignorant of any false or fraudulent representations made by the entrymen aforesaid in their respective homestead proofs, but this defendant denies that any false or fraudulent representations were made by said entrymen in respect of their homestead proofs. This defendant admits that shortly

after the issuance of the final certificates each of said entrymen executed to this defendant a mortgage as hereinafter more particularly set forth and described, but not otherwise, and for money advanced as hereinafter more particularly explained and alleged, and not otherwise.

XII.

Answering paragraph XII of said complaint, this defendant is informed and believes, and therefore admits it to be a fact, that after final proofs had been made and submitted in respect of the entries in the complaint mentioned, the officers of the United States Land Office at Oregon City, Oregon, transmitted the papers and testimony relating to each of said homestead applications to the General Land Office of the United States, and that thereafter the President of the United States and the officers of the Department of the Interior and the General Land Office did issue to each of said applicants and entrymen a patent purporting to convey to the respective applicants and entrymen the land described in their respective applications and entries and upon the dates mentioned in said paragraph XII; but this defendant denies that such patents were issued notwithstanding the alleged facts and alleged frauds and alleged false representations and testimony in the complaint averred or any thereof, and denies that the President of the United States and the officers of the Depart-

ment of the Interior and of the General Land Office of the United States or any of them, being ignorant of the alleged false and fraudulent character of said papers and testimony, issued said patents or caused the same to be issued, but on the contrary, this defendant denies that there was any false or fraudulent proofs, entries or papers submitted to said officers or any of them.

## XIII.

Answering the thirteenth paragraph of said complaint (designated therein as paragraph XV), this defendant denies that all or any of the alleged false or fraudulent representations made by the several entrymen or any of them, or made by said entrymen and their witnesses or any of them, or any witness or person, or any false or fraudulent representations in the said complaint averred, were made with the knowledge or at the solicitation of this defendant or made with the intent to deceive or defraud the United States out of the use of or title to or possession of the lands or any of the lands in the complaint described, and denies that the complainant relied upon the alleged or any of the false and fraudulent, or false or fraudulent, or any false or fraudulent representation alleged in the complaint to have been made, or was deceived or defrauded thereby, and denies that by reason of such alleged false and fraudulent representations or of any false or fraudulent representation or unlawful, collusive, or corrupt agree-

ment or understanding between said entrymen or any of them and this defendant, plaintiff was wrongfully or unlawfully induced to issue said patents or any thereof, or part with the title to said lands or any thereof, to its damage in the sum of $133,000.00, or in any sum or amount whatever.

XIV.

Answering paragraph XIV of said complaint (designated therein as paragraph XVI), this defendant denies that at the time of the applications and entries or applications or entries on said lands or any thereof, or at the time of the issuance of patents therefor or for any thereof, the lands in the complaint described were of the reasonable, aggregate value of $31,400.00, or any other sum or amount whatever save and except that each tract of land entered was worth the amount of the fees required to be paid to the officers of the United States in making and perfecting a homestead entry therefor, and denies that said lands are now of the reasonable, aggregate value of the sum of $133,000.00, or any other greater sum than $....., and denies that by reason of the alleged fraudulent practices and representations or of any fraudulent practice or representation, solicited, induced or committed by this defendant, as in the complaint alleged, or otherwise, or at all, or relying upon which the plaintiff was wrongfully induced to issue patents for said lands or any thereof, and

denies that plaintiff was thereby or by reason of any act or thing alleged in the complaint, or otherwise, or at all, damaged in a sum of money equal to the full value of said lands or in any sum or amount whatever, or in the sum of $133,000.00, or any sum or amount whatever, or is entitled to recover the same or any amount whatsoever from this defendant.

And this defendant, for A FIRST FURTHER AND SEPARATE ANSWER AND DEFENSE, avers:

I.

That heretofore, some time in the year 1900, the lands described in the complaint and other lands in the vicinity thereof being open for entry under the homestead laws of the United States, and being largely timbered lands, this defendant did cause said lands and others to be cruised for the purpose of ascertaining approximately the amount of timber on the several legal subdivisions and for the purpose of ascertaining the nature and character of each legal subdivision, to the end that this defendant might engage in the business of locating thereon qualified persons under the homestead laws who desired to enter land subject to entry under such laws. The plan adopted by this defendant is substantially set forth in the form of contract set out in paragraph VII of the complaint in the above entitled cause. That at different times, and prior to making

their respective entries, this defendant entered into a contract with the several parties mentioned and named in paragraph VI of said complaint, which contract in each instance was in substantially the form of the form of contract set forth in paragraph VII of said complaint aforesaid. That in each instance it was the desire, purpose and intention of this defendant that said parties respectively and each party or person with whom he contracted as aforesaid should in all respects comply with the homestead laws of the United States, and the purpose and object of this defendant in entering into such contracts was to earn the fee charged for locating the entrymen. That in each instance this defendant complied strictly with the terms of the agreement entered into between him and the entryman, and in each instance this defendant avers that he believed at the time proof was made that each entryman had faithfully and honestly complied with the homestead laws of the United States in the matter of making settlement, cultivation, improvements, and proof under the homestead laws of the United States, and after making the required settlement, cultivation, improvements and proofs, the entrymen executed to this defendant in each case a mortgage on the land entered to secure to this defendant the payment of the amount by him advanced under such contract, the same being the mortgage in the complaint mentioned and referred to. That in all said matters and transactions and in every matter connected

with said entries this defendant acted in good faith and without any intention or purpose to cheat, defraud, or deceive the complainant.

For a SECOND FURTHER AND SEPARATE ANSWER AND DEFENSE to this action, this defendant avers:

That the cause of action in the complaint alleged accrued more than six years next prior to the date of filing the said complaint in this action, and did not accrue at any time within the six years next before the commencement of this action.

And this defendant for a THIRD FURTHER AND SEPARATE ANSWER AND DEFENSE, avers:

I.

That the several tracts of land in the complaint described as having been respectively entered by the entrymen mentioned in said complaint, were at the time the same were entered subject to entry as homesteads under and pursuant to the Act of Congress of August 15th, 1894, and each of said tracts of land was entered as a homestead at the time and by the person alleged in the said complaint, under said Act of Congress, and not otherwise, except that the said entrymen did not pay the sum of $1.50 per acre, or any sum per acre, for said lands so entered, or any thereof, (except that said

entryman Wells paid for commutation as hereinafter averred), because of the Act of Congress of May 17th, 1900, referred to in paragraph III of said complaint. This defendant further alleges that the said Act of August 15th, 1894, among other things, required and provided that as a condition precedent to acquiring title to any such lands, under the homestead laws, an entryman should actually reside on and cultivate the lands so entered for the period of three years, and that such actual residence should be established by the testimony of two witnesses in addition to the testimony of the entrymen.

II.

That the entrymen named in the said complaint, namely, Benjamin S. Hunter, Oliver I. Conner, William Teghtmeier, Richard P. Depue, Joseph Gillis, Thomas Johnson, Edward C. Brigham, and Anthony Gannon, respectively entered the respective tracts of land in the complaint described and averred to have been by them respectively entered, under the said Act of August 15th, 1894, and on the dates in the said complaint alleged. That none of the said entrymen last named, either by himself or by his final or homestead proof witnesses, or any witness produced by him, or otherwise, when he made his homestead or final proof, or at any time, claimed, represented or testified in making such proof, or any proof, or otherwise, that he had

resided upon the said land by him entered for a period of three years or for any other or greater period than as follows: That is to say, the said Edward C. Brigham and his final proof witnesses stated and testified that he, the said Edward C. Brigham, first established a residence on the land by him entered as aforesaid in October, 1900, and his homestead or final proof, and the only proof made and submitted by him, was made and submitted on December 23d, 1901. That the said Anthony Gannon made final or homestead proof, and the only proof made by him under his said homestead entry, on the 25th day of November, 1901, and in making such proof stated and testified, as did his final proof witnesses, that he went upon and made settlement and first acquired a residence on the said tract by him entered October 1st, 1900. That the said Joseph Gillis made and submitted final or homestead proof under his entry aforesaid, and the only proof made by him under said entry, on the 4th day of November, 1901, and in making said final proof testified, as did also his final proof witnesses, that he first established his residence on the land so entered by him on the 1st day of October, 1900. That the said Oliver I. Conner made his homestead or final proof, and the only proof made by him under his said homestead entry, on the 4th day of November, 1901, and in making such proof testified and represented that he had first made and established actual residence on the

land so entered by him on the 26th day of September, 1900. That the said Benjamin S. Hunter made and submitted the homestead or final proof, and the only proof made by him under his said homestead entry, on the 23d day of December, 1901, and in making such proof testified and represented, as did also his final proof witnesses, that he had first made and established actual residence on the land so by him entered in September, 1900. That said Richard P. Depue made and submitted final proof, and the only proof made by him under his entry, on November 25th, 1901, and in making such final proof testified, as did his final proof witnesses, that he first established actual residence on the land so by him entered September 24th, 1900. That said Thomas Johnson made and submitted homestead or final proof, and the only proof made by him under his said entry, on the 9th day of November, 1901, and in making such proof testified and stated, as did his final proof witnesses, that he had first established a residence on the land so by him entered on September 26th, 1900. That said William Teghtmeier made and submitted final proof, and the only proof made by him under his said entry, on the 26th day of May, 1902, and in making such final proof testified and stated, as did his final proof witnesses, that he first established an actual residence on the land so by him entered in September, 1900.

III.

That each of the said entrymen mentioned in the last above paragraph of this answer, in making his homestead or final proof also made proof of the fact that he had served in the Army or Navy of the United States for periods as follows:

Benjamin S. Hunter enlisted January 4, 1864; discharged December 16, 1865;

Oliver I. Conner enlisted May 2, 1862; discharged May 2, 1865;

William Teghtmeier enlisted June 1, 1861; discharged July 20, 1864;

Richard D. Depue enlisted January 14, 1864; discharged December 18, 1865;

Joseph Gillis enlisted August 2, 1862; discharged June 10, 1865;

Thomas Johnson enlisted November 13, 1861; discharged February 10, 1864;

John L. Wells enlisted September 4, 1864; discharged June 10, 1865;

Edward C. Brigham enlisted August 9, 1862; discharged June 4, 1865; and

Anthony Gannon enlisted September 19, 1861; discharged October 5, 1864;

and had been honorably discharged, and claimed credit under the provisions of sections 2304 and 2305, U. S. R. S. for such military service in lieu of residence on the land by him entered as aforesaid, to the extent of the difference between the period of residence shown by his proof submitted and the full term of three years aforesaid, which claim was in each case considered and allowed by plaintiff in lieu of such portion of the actual residence of three years by law required under said Act of August 15, 1894.

IV.

That the plaintiff and its agents and officers, in considering and passing on said final proofs, well knew that each of said entrymen and his final proof witnesses had therein testified, stated and claimed less than two years actual residence on the part of such entryman, and neither the said plaintiff nor any of its agents or officers in considering said final proofs believed or understood, or had any reason to believe or understand, that any of said entrymen had represented or claimed to have resided upon said lands or any thereof for three years, but on the contrary the plaintiff and each and all of its agents and officers, by mistake of law, gave and allowed to each of said entrymen credit for military service as aforesaid, as a major part of the three years actual residence required by law, and by reason of such mistake of

law, and not otherwise, issued the final certificates and patents mentioned and referred to in the complaint.

V.

Defendant further alleges that the said entryman John L. Wells, referred to in the complaint of the plaintiff herein, in making the homestead or final proof mentioned in Paragraph X of said complaint, claimed and availed himself of the benefit of the Act of Congress of January 26th, 1901, entitled "An Act to allow the commutation of homestead entries in certain cases," under and by the terms of which act a person making homesteadstead was authorized to make homestead commutation proof under the provisions of Section 2301, Revised Statutes of the United States.

VI.

That under and by virtue of the Act of August 15th, 1894, and said Section 2301, the said entryman John L. Wells was required by law in making such homestead commutation proof to establish and show that he had actually resided upon the land so entered by him for a period of at least fourteen months.

VII.

That the said entryman Wells made such homestead commutation proof on the 26th day of May, 1902, and in making such proof testified as follows:

"Q. When was your house built on the land,

and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof).

"A. In August or September, 1900—August, 1900—log cabin 14x16, shingle roof—2 acres cleared—some apple trees—considerable of a roadway cut—2 acres fenced—about $300.00.

"Q. Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried state the fact).

"A. I was unmarried when I filed. I have been married a little over a year and my wife has been with me on the land since then.

"Q. For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if been previously absent did your family reside upon and cultivate the land during such absence?

"A. Temporary absence about 4 months—when I was absent my wife was with me.

"Q. How much time since entry have you actually lived upon the land?

"A. Between the time of entry, viz., October 1, 1900, and the present time I have been there

five times, remaining there each time from one to two weeks."

VIII.

And this defendant avers that by the answers and representations aforesaid the said entryman Wells notified and advised the plaintiff that he had not actually resided upon said land to exceed ten weeks prior to the date of making such proof, which proof is the homestead proof referred to in the plaintiff's complaint. And defendant further avers that the said plaintiff and its officers and agents, in considering said final proof and in issuing the final certificate and patent referred to in the complaint to the said Wells, fully and well knew and understood that said Wells had not resided upon said land to exceed ten weeks, and so knowing and understanding, the said plaintiff issued such certificate and the patent to said Wells in the complaint mentioned.

For a FOURTH FURTHER AND SEPARATE ANSWER AND DEFENSE, this defendant avers:

I.

That each of the entrymen mentioned and referred to in Paragraph II of the Third Further and Separate Answer herein, in making and submitting his final homestead proof in the complaint mentioned and referred to, personally and each of his final proof witnesses testified, stated and advised the plaintiff, its agents and officers,

that he, the said entryman, had not resided upon the land by him entered as in the complaint described, or any thereof, prior to the making of his homestead or final proof in the complaint mentioned, for the period of three years, nor for any greater period than from one to one and one-half years. That the plaintiff and its officers and agents, in considering said homestead or final proofs and in issuing the final certificates and patents in the complaint mentioned, well knew and understood that each of said entrymen had not resided upon the land by him entered in the complaint mentioned for three years prior to the making of the homestead or final proof in the complaint mentioned, nor for any greater period of time than from one to one and one-half years, but notwithstanding said knowledge and understanding, the plaintiff, its agents and officers, by mistake of law, erroneously issued said certificates and patents in the complaint mentioned.

II.

That the said entryman Wells, in making his homestead or final proof in the complaint mentioned, testified and stated and advised the plaintiff, its agents and officers, that he had not actually resided upon said land prior to the making of said homestead or final proof for a total period of more than ten weeks, and the said plaintiff, its agents and officers, in considering said final proof, well understood and knew that he, the said Wells,

had not resided on said land as aforesaid for a period of more than ten weeks, but notwithstanding such knowledge the plaintiff, its agents and officers, by mistake of law, and not otherwise, erroneously issued said certificates and patents in the complaint mentioned. That said Wells paid plaintiff for the tract, consisting of 160 acres, entered by him, in the complaint mentioned, the sum of $240.00, the full minimum price and value thereof, prior to the issuance of the patent therefor, in the complaint mentioned.

III.

That prior to the commencement of this action the said tracts of land in the complaint described as having been entered by and patented to the said entrymen Edward C. Brigham, Thomas Johnson, William Teghtmeier, and John L. Wells, were, for the full market value thereof, sold and conveyed to and purchased by, and are now owned and held by Chautauqua Lumber Company, a corporation; and the tracts in said complaint described as having been entered by and patented to said entrymen Anthony Gannon, Joseph Gillis, Oliver I. Conner, Benjamin S. Hunter, and Richard D. Depue, were, for the full market value thereof, paid by the purchaser, granted, bargained, sold and conveyed to, and are now owned and held by Sunset Timber Company, a corporation of the State of Oregon. That said Chautauqua Lumber Company and said Sunset Timber Com-

pany, hereinafter referred to as purchasers, each purchased the land so conveyed to it in good faith without any knowledge, notice, information or belief that the plaintiff claimed any interest therein, or in or to any thereof, or that there was any defect in the title thereto or to any thereof, and each of said purchasers in purchasing said lands so to it conveyed, acted in good faith in all respects and without any knowledge, information, belief or notice whatsoever of the alleged frauds and deceits, or frauds or deceits, or any thereof in the complaint alleged, and each of said purchasers paid for each tract of the lands aforesaid to it conveyed the full market value thereof at the time of purchasing the same.

IV.

And this defendant avers that by reason of the premises, even if it shall be adjudged that the plaintiff is entitled to recover any sum in this action, it cannot have or recover a sum exceeding the Government minimum price of said lands by statute provided, namely, the sum of $1.50 per acre.

WHEREFORE, this defendant demands judgment that this action be dismissed and that he have and recover his costs and disbursements herein.

FULTON & BOWERMAN,

SCHWARTZ & SAUNDERS,

Attorneys for Defendant.

State of Oregon,

County of Multnomah—ss.

I, Willard N. Jones, being first duly sworn, depose and say, that I am the defendant in the above entitled cause and that the above and foregoing amended answer is true as I verily believe.

WILLARD N. JONES.

Subscribed and sworn to before me this 10th day of March, 1916.

C. W. FULTON,

Notary Public for the State of Oregon.

My commission expires July 10th, 1916.

State of Oregon,

County of Multnomah—ss.

Due service of the within Amended Answer by the delivery of a duly certified copy thereof as provided by law, at Portland, Oregon, on this 9th day of March, 1916, is hereby admitted.

E. A. JOHNSON,

Of Attorneys for Complainant.

Filed March 13, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 15th day of March, 1916, there was duly filed in said Court and cause a Demurrer to Amended Answer, in words and figures as follows, to wit:

## DEMURRER TO AMENDED ANSWER.

Comes now the plaintiff above named, by E. A. Johnson, Assistant United States Attorney for the District of Oregon, and demurs to the second further and separate amended answer and defense of the defendant heretofore on March 13, 1916, filed in the above entitled court and cause, for the reason that the facts therein alleged are insufficient in law to constitute a defense to the complaint of plaintiff.

And demurs to the third further and separate amended answer and defense of the defendant heretofore on March 13, 1916, filed in the above entitled court and cause, for the reason that the facts therein alleged are insufficient in law to constitute a defense to the complaint of plaintiff:

And demurs to the fourth further and separate amended answer and defense of the defendant heretofore on March 13, 1916, filed in the above entitled court and cause, for the reason that the facts therein alleged are insufficient in law to constitute a defense to the complaint of plaintiff.

Dated at Portland, Oregon, this 15th day of March, 1916.

E. A. JOHNSON,
Assistant United States Attorney.

United States of America,
District of Oregon—ss.

Due, timely and legal service of the within demurrer by receipt by me of certified copy thereof is hereby admitted at Portland, Oregon, this 15th day of March, 1916.

C. W. FULTON,

Of Attorneys for Willard N. Jones, Defendant.

Filed March 15, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Friday, the 31st day of March, 1916, the same being the 23rd judicial day of the regular March, 1916, term of said Court; present, the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

## ORDER ON DEMURRER.

This cause was heard upon the demurrer of the plaintiff to the second, third and fourth separate and further defenses pleaded in the amended answer filed by said defendant, and was argued by Mr. Everett A. Johnson, Assistant United States Attorney, and by Mr. C. W. Fulton and Mr. H. H. Schwartz, of counsel for said defendant.

ON CONSIDERATION whereof it is ORDERED and ADJUDGED that said demurrer be, and the same is hereby overruled, as to the third and fourth defenses and sustained as to the second defense.

And afterwards, to wit, on the 31st day of March, 1916, there was duly filed in said Court and cause an Opinion on Demurrer to Amended Answer, in words and figures as follows, to wit:

## OPINION.

This is an action to recover damages, based upon fraud and deceit.

By an act of August 15, 1894 (28 Stat. 286, 326), provision was made for disposition of certain ceded lands formerly a part of the Siletz Reservation, in language following:

> "The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under the townsite law and under the provisions of the homestead law. Provided, however, that each settler, under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in

homestead proofs as a prerequisite to title or patent."

Subsequently, by act of May 17, 1900 (31 Stat. 179), the Congress provided in effect that, upon payment to the local land officers of the usual and customary fees, no other or further charge of any kind whatsoever should be required from such settler to entitle him to a patent to the lands covered by his entry. This was designed as an amendment of the act of August 15, 1894, and relieved the entryman from payment of $1.50 per acre as a prerequisite to obtaining his patent from the Government.

In general, the complaint avers that the defendant Jones, with the view of acquiring title in himself and persons associated with him to lands subject to disposition under the act of August 15, 1894, entered into fraudulent arrangements with certain persons, nine in number, whereby each of such persons should make application to homestead a certain tract of the lands subject to entry under said act, and that each should make fraudulent and false proofs as to settlement, residence, improvements, cultivation, etc., at the time of making final proofs so as to entitle him to patent; that said persons accordingly pretended to make settlement upon the lands selected as their homesteads, and offered and made homestead proofs, and submitted the same to the proper officers of the United States Land

Office at Oregon City, "that in and by said homestead proof, each of said entrymen by himself and two witnesses falsely and fraudulently represented that he had as required by law, established a residence upon and resided upon the land embraced in his said entry continuously after the alleged establishment of residence thereon until the time of said proofs, and had made substantial improvements thereon as set forth in said proof; that he had been only temporarily absent from said lands for a short time for the purpose of earning money to improve the same, and those entrymen having families, each further falsely gave proof by himself and witnesses that his family resided on the claim in the absence of the entryman; that he had cultivated that portion of said lands specifically set out in his said proof and that he had not conveyed any part of said lands and had not made any contract directly or indirectly whereby the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself; and that he was acting in good faith in perfecting the entry, when in truth and in fact, as each of said entrymen and his witnesses then and there well knew at the time of making said proofs, had not established a residence upon said lands and had never resided thereon and had no improvements thereon, and none of the said entrymen as they and their witnesses well knew, had cultivated that part of his said entry set forth in his homestead proof, or any part thereof,

for the time set forth in said proof or at any time, but if any part of any of said homestead entries was cultivated, the same was done by the defendant, Willard N. Jones, and all improvement made thereon was made by the defendant, Willard N. Jones, and not by any of said entrymen; and plaintiff alleges that none of said entrymen had acted in good faith or was acting in good faith in perfecting said entry, but was making the same upon speculation and not for the purpose of making or securing for himself or his family, a home; that in truth and in fact, all of said entrymen, after the making of their respective entries as aforesaid, continued at all times during the life of their respective entries, to reside at Portland, Oregon, except Benjamin S. Hunter, who resided at all said times at Dundee, Oregon, as aforesaid; that no improvements were made upon any of said lands during the life of said homestead entries, with the exception that the said defendant, Willard N. Jones, for the purpose of falsely and fraudulently making it appear that each of said entrymen resided upon his respective entry, had a house thereon built, a small, flimsy, uninhabitable shack upon the lands within each of said entries, shortly before said proofs were made; and the said Willard N. Jones, also in furtherance of said fraudulent and collusive purpose, caused a small tract upon each of said entries, in extent less than an acre, to be scratched over in order to give a semblance of a foundation for the statements of the entrymen and their witnesses that a

portion of their respective entries had been cultivated."

By further averment is appears that, relying upon the false and fraudulent representations thus made by the entrymen, the officers of the Government were induced to issue final certificates to them, and eventually patents covering the lands comprised by the homesteads thus entered.

The prayer is for damages in the sum of $133,000.

The defendant, for a second further and separate answer, has set up the statute of limitations of six years.

For a third further and separate answer, it is averred in effect that, as to eight of the entrymen, none of them, either by himself or by his final or homestead proof witnesses, or any witness produced by him, claimed, represented, or testified that he had resided upon said land by him entered for a period of three years, or for any other or greater period than as set out at length; the proofs showing that length of residence ranged from 13 to 20 months after entry, supplemented by proof of service in the Army or Navy of the United States for the remaining period of the three years. Thereupon it is alleged:

"That the plaintiff and its agents and officers, in considering and passing on said final proofs, well knew that each of said entrymen and his final proof witnesses had therein testified, stated and claimed less than two

years' actual residence on the part of such entryman, and neither the said plaintiff nor any of its agents or officers in considering said final proofs believed or understood, or had any reason to believe or understand, that any of said entrymen had represented or claimed to have resided upon said lands or any thereof for three years, but on the contrary the plaintiff and each and all of its agents and officers, by mistake of law, gave and allowed to each of said entrymen credit for military service as aforesaid, as a major part of the three years' actual residence required by law, and by reason of such mistake of law, and not otherwise, issued the final certificates and patents mentioned and referred to in the complaint."

As to Wells, the remaining one of the nine entrymen, it is alleged that he commuted, but that his proofs show on their face that he was not an actual resident on his pretended homestead to exceed 10 weeks. And in this relation defendant further avers, in effect, that the plaintiff and its officers and agents, in considering said final proof and in issuing the final certificate and patent referred to in the complaint to the said Wells, fully and well knew and understood that Wells had not resided upon said land to exceed ten weeks, and notwithstanding this knowledge and understanding, issued such certificate and patent to Wells.

A fourth further and separate answer is interposed which relates wholly to the measure of damages that should be applied if recovery be had.

The plaintiff demurred to each of these three further and separate answers, on the ground that the facts stated are insufficient in law to constitute a defense.

Wolverton, District Judge:

As the second further and separate answer, the demurrer must be sustained, for the reason that the same question has been previously decided adversely to defendant in this cause. United States v. Jones, 218 Fed. 973.

The vital question presented by the third further and separate answer is whether a cause for deceit will lie where the alleged deceit practiced is concerning a matter not material to the subject of negotiation.

The situation in brief is this: Under the general homestead act and other provisions of law having relation to specific territory or localities, and by virtue of sections 2304-2305 R. S., and the act of January 26, 1901 (31 Stat. 740) relating to the commutation of homestead entries in certain cases, honorably discharged soldiers who have made homestead entries are entitled to have the time of their military service deducted from the time of residence and cultivation required to entitle the homesteader to patent; one year's residence being required notwithstanding military service. To illustrate, the time of residence under the general homestead law being five years, if an honorably discharged soldier had performed military service for three years, he would be

entitled to have the time of that service deducted from the five years, and would be entitled to patent after having resided upon his homestead for the period of two years. Now, this regulation was applied by the Government as to eight of the persons alleged to have made false and fraudulent final proofs respecting their homesteads. The proofs were of residence of from 13 to 20 months, and of military service to supplement the same to make out three years' residence on the land, as required by the act of August 15, 1894. The final receipts were all issued prior to the expiration of the three years subsequent to entry upon the lands.

Properly construed, the act of August 15th does not admit of any such application. This is conceded, and the Interior Department has so construed the act as applied to the Siletz Indian Reservation lands. See letter of Assistant Commissioner to Register and Receiver, Oregon City, Oregon, of date July 2, 1902, In re Hattie C. Allebach, H. E. No. 12949.

The act of August 15, 1894, as it applies to the Siletz Reservation lands, requires that three years' actual residence on the land shall be established "by such evidence as is now required in homestead proofs," as a prerequisite to title or patent. This means actual residence for the term, not for a portion thereof supplemented by time of military or other service, and manifestly it should have been required of these eight homesteaders before

final certificates were issued or patents granted to the lands comprised by their homesteads. In issuing the certificates and granting the patents, the Land Department acted under a clear mistake of law, and, even if it be conceded that the proofs submitted were true in every respect, and made in entire good faith, the entrymen were not entitled to title to the lands or to the patents.

Now, having gotten their patents on false proofs, which proofs, if true, would not have entitled them thereto, will the fraud and deceit thus practiced, if it may be so termed, afford grounds upon which the Government may have relief in damages against the participants in the fraud? The proofs made were in no wise material to any inquiry pertinent to the establishment of the entrymen's right to their patents, they were wholly irrelevant to the inquiry that might properly have been made; that is, an inquiry with a view to ascertaining whether three years' actual residence had been made, with cultivation, improvements, etc., as required by the act of August 15, 1894.

The general rule on the subject is tersely stated in American and English Enc. of Law, Vol. 14, p. 59, as follows:

> "To constitute fraud, a representation must be as to a material fact. With respect to this rule, there is no conflict of opinion, except sometimes in its application. A representation in re-

> lation to a fact that is not material to a contract, though it may be false and known to be false by the person making it, and though it may be acted upon by the other party, is not fraud, either for the purpose of an action of deceit, or for the purpose of rescinding the contract."

Then again, at page 62:

> "It has been said that fraud is material to a contract if the contract would probably not have been made if the fraud had not been practiced. This, however, is not always true. If a representation is not material, a person has no right to act upon it, and if he does, he is not entitled to relief or redress on the ground of fraud. The question is not whether the person to whom the representation was made deemed it material, but whether it was in fact material."

The rule that the false representations must be of a fact material to the contract or inquiry has the approval of the United States Supreme Court. See Marshall v. Hubbard, 117 U. S. 415. The Circuit Court in that case instructed the jury, among other things, that "Not only must the representations be made, not only must they be fraudulent, and not only must it appear that the party relied, and had a right to rely, upon them, but it must also be shown that the representations were material to the contract or transaction which took place between the

parties." Then after so instructing, the court said: "I think, therefore, that upon the proofs the case is within the rule laid down by the Supreme Court of the United States, namely, the court can now see, upon the evidence that bears upon the question of materiality of the representations, and alleged injury to the defendant, that if the jury were to render a verdict against the plaintiff it would have to set that verdict aside." The court thereupon directed a verdict for the plaintiff, the fraud having been set up by the answer as a defense. On appeal to the Supreme Court, the action of the Circuit Court was affirmed, thus approving the holding of the Circuit Court.

Other cases hold to the same principle, that the false representations must be of a fact material to the contract or transaction to constitute actionable deceit. Saxby and Wife v. Southern Land Co., 109 Va. 196; Hall v. Johnson, 41 Mich. 286. In the latter case the court says:

> "False representations, no matter how acted upon, will not be sufficient to set aside an agreement otherwise valid unless they were material." Missouri Lincoln Trust Company v. Third National Bank of St. Louis, 154 Mo. App. 89;
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> Furneaux v. Webb, 33 Tex. App. 560;
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> Anderson v. Adams, 43 Or. 621, 627.

The rule is further extended to comprise alleged

false representations as to a fact of which the opposing party had knowledge, or which was patent to him, or of a fact upon which he had no right to rely. In either of such cases the action of deceit will not lie. Prince v. Overholder, 75 Wis. 646 (citing Slaughter's Adm'r v. Gerson, 13 Wall. 385).

Robins v. Hope, 57 Cal. 493. No misrepresentation concerning the state of a party's own title to land can be treated as misleading to him.

Russell v. Branham, 8 Blackford's Reports (Ind.) 277. A party is not responsible for a misrepresentation of the legal effect of a contract.

First National Bank of Elkhart v. Osborne et al, 18 Ind. App. 442.

Now, applying the doctrine as thus established by the authorities, it is perfectly manifest that the alleged false representations made by the proofs of the eight entrymen and their witnesses were wholly immaterial to the inquiry and to the transactions of the entrymen with the Government; and not only this, the representations were of facts upon which the Government had no right to rely. The Government knew the law and was cognizant of the proper interpretation thereof, and, having such knowledge, it could not be deceived by proofs that had relation to acts that could not in any way be construed as a compliance therewith.

The Government seeks to meet this objection to the right of recovery by invoking the doctrine that a party who has effected his purpose through a misrepresentation cannot deny its materiality. Bigelow on Fraud, 497. Citing also Fargo Gaslight & Coke Co. v. Fargo Gas & Electric Co., 37 L. R. A. 593, and note.

But the law cannot make that material which is absolutely not material, and so appears by the very transaction itself and the law governing the case. The law of estoppel cannot go so far as to make false representations made in one transaction binding in another and a totally distinct transaction.

It is further suggested that the matter of materiality is for the jury and not for the court.

> "Concerning the elements which go to make up a case of fraud, it is for the court and not for the jury to determine whether e. g. an inducement held out by one party to another, which the latter professes to have acted upon, is material or not. * * * Generally speaking it is also for the court to interpret language of a perfectly plain nature, unaffected by external facts such as the particular circumstances in which it was used; when so modified, it is for the jury to declare its meaning. But when, as we have just said, the language is plain and not subject to modification aliunde, the case is for the court; and this is

> true in principle whether the language be written or oral. There is no question of the truth of this proposition when applied to written language; and there ought to be none in regard to oral statement, for no sound distinction can be drawn between the two cases."
>
> Bigelow on fraud, p. 139.

This quotation from Bigelow answers the objection. As it relates to the eight entrymen, I am impelled to the conclusion that the answer states a good defense.

The case of Wells presents the question in a different aspect. Wells made application October 1, 1900, and commuted May 26, 1902. Under the statute (Sec. 2301 R. S.), Wells was entitled to commute, if so entitled at all, upon making proof of settlement and of residence and cultivation for a period of fourteen months. The act of August 15, 1894, requires actual residence. Adams v. Coates, 38 Land Decisions, 179. Wells by his own testimony shows that he had not actually resided on his homestead anywhere near fourteen months. He was asked, "How much time since entry have you actually lived upon the land?" To which he answered, "Between the time of entry, viz., October 1, 1900, and the present time I have been there five times, remaining there each time from one to two weeks."

The Government knew from this testimony that Wells had not complied with the law. Notwithstanding,

it issued to him the final receipt and later the patent. Being fully aware of the situation, the Government could not have been deceived by the proofs made. Even if true, the proofs did not entitle Wells to his final receipt or patent. So that, in either aspect, the Government could not have been defrauded of the land. If it be argued that the Government relied upon the proofs, the natural and pertinent answer is that, knowing the law and the requirements of Congress in such a case, it had no right to rely upon them, whether true or false, to the extent of approving the claim and issuing final receipt and patent. Such being the situation, the Government is not entitled to an action in deceit.

The demurrer will be sustained as to the second further and separate defense, and overruled as to the third.

As to the fourth, I am still of the opinion that this is not the time to pass upon the question involved.

Judgment accordingly.

Filed March 31, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 31st day of March, 1916, there was duly filed in said Court and cause, a Reply in words and figures as follows, to wit:

## REPLY.

Comes now the complainant in the above entitled action, and by this reply denies each and every allegation contained in defendant's first further and separate an-

swer and alleged defense, except as in the complaint of complainant alleged; and here replying to defendant's third and fourth further and separate amended answers and defenses, complainant admits, denies and alleges:

I.

Replying to paragraph I of defendant's third, further and separate amended answer, complainant alleges that the several tracts of land in the complaint described as having been respectively entered by the entrymen therein mentioned were, at the time the same were entered, subject to entry as homesteads under and pursuant to the act of Congress approved August 15, 1894, as amended by acts of Congress approved May 17, 1900, and January 26, 1901, and that each of said tracts of land was entered as a homestead at the time and by the person alleged in the complaint of complainant under said acts of Congress and not otherwise, and complainant admits that the said entrymen did not pay the sum of $1.50 per acre or any sum per acre for said lands so entered, or any thereof (except as said entryman Wells paid for commutation of his one of said entries) because and by reason of the provisions of said act of Congress approved May 17, 1900, and referred to in paragraph III of the complaint of complainant; and complainant further admits that by the provisions of said act of August 15, 1894, as amended by said act of Congress approved May 17, 1900, and upon claims made thereunder

and not commuted under the provisions of said act of Congress approved January 26, 1901, three years actual residence on the land was required of the entryman to be established by such evidence as was required in homestead proofs, and that such proof of such residence on the part of such entryman was prerequisite to the passing of title or issue of patent to the lands so entered, but complainant denies each and every other allegation of said paragraph of said third further and separate amended answer contained.

II.

Replying to paragraph II of defendant's third further and separate amended answer, complainant admits that the entrymen named in the complaint of complainant, namely, Benjamin S. Hunter, Oliver I. Conner, William Teghtmeier, Robert D. Depue, Joseph Gillis, Thomas Johnson, Edward C. Brigham and Anthony Gannon, respectively entered the respective tracts of land in the complaint described and averred to have been by them respectively entered under the said act of Congress approved August 15, 1894, as amended by said act of Congress approved May 17, 1900, and on the dates in the said complaint alleged, and complainant admits each and every other allegation in said paragraph II of said further and separate amended answer contained.

III.

Replying to paragraph III of defendant's third fur-

ther and separate amended answer, complainant admits each and every allegation therein contained and the whole thereof.

IV.

Replying to paragraph IV of defendant's third further and separate amended answer, complainant admits that complainant and its agents and officers, in considering and passing on the final proofs of the entrymen Hunter, Conner, Teghtmeier, Depue, Gillis, Johnson, Brigham, and Gannon, well knew that each of said entrymen and his final proof witnesses had therein testified, stated and claimed less than two years actual residence on the part of such entryman upon his entry and admits that neither the said complainant nor any of its agents or officers, in considering said final proofs believed or understood or had any reason to believe or understand that any of said entrymen had represented or claimed to have resided upon said lands so by them entered, or any thereof, for three years, and admits that complainant and each and all of its agents and officers gave and allowed to each of said entrymen credit for military service as aforesaid, as a major part of the three years' actual residence required by said act of Congress approved August 15, 1894, as amended by said act of Congress approved May 17, 1900, and issued the final certificates and patents to said entrymen mentioned and referred to in the complaint of complainant, but complainant denies each and every other allegation in said

paragraph of said third further and separate amended answer contained, and avers that the issuance of said final certificates and patents was induced by the fraud heretofore alleged of defendant and of said entrymen and witnesses aforesaid; and complainant further alleges but for the said fraud so by defendant and by said entrymen and proof witnesses practiced upon complainant as in the complaint thereof alleged, none of said final certificates or patents would have been by complainant issued.

V.

Replying to paragraphs V, and VI of the third further and separate amended answer of defendant complainant admits each and every allegation in said paragraphs contained and the whole thereof.

VI.

Replying to paragraph VII of the third further and separate amended answer of defendant, complainant admits that the said entryman Wells made commutation homestead proof on said 26th day of May, 1902, and in making such proof testified, among other things, substantially as is set forth in said paragraph VII aforesaid, but complainant denies that the whole of the testimony and proof of said Wells is in said paragraph set forth, and avers that that portion of the testimony and proof set forth in said paragraph VII is but a part and portion of the fraudulent and false testimony and final

proof submitted by said Wells and by his said witnesses; and complainant avers that on said 26th day of May, 1902, and as a part of his final homestead proof, and in addition to the testimony in said paragraph VII of said further and separate amended answer set forth, the said Wells falsely swore and testified, among other things, as follows:

> "I, John L. Wells, claiming the right to commute under Section 2301 of the Revised Statutes of the United States, my homestead entry No. ——, made upon the S½ SE ¼ and Lots 1 and 2, Sec. 10—NE¼ NE¼ section 15, township 9 S range 10 W, do solemnly swear that I made settlement upon said land on the ——— day of August, 1900, and that since such date, to wit: on the ——— day of August, 1900, I have built a house on said land, and have continued to reside thereon up to the present time."

And among other things, as follows:

> "Q. Why have you not spent more time upon your claim?
>
> A. I had to get away to get my living as I could not get a living on the claim and had to earn my living. I am an insurance agent and have been attending at the local office in Portland upon this business, and thus only temporarily absent from my claim for this purpose. I do

not own any home anywhere except upon this claim. My wife was there with me in August, 1901, remaining there with me two weeks. It is impossible for us to remain steadily upon the tract in its present condition, and we have done the best we could to fulfill the law and at the same time earn a living for ourselves."

And among other things, as follows:

"I, John L. Wells, having made a homestead entry on the S½ SE¼ and lots 1 & 2, section 10 and NE¼ NE¼ section No. 15, in township No. 9 S. range No. 10 W., subject to entry at Oregon City, Oregon, under Section 2301 of the Revised Statutes of the United States do now apply to perfect my claim thereto by virtue of Section 2301 of the Revised Statutes of the United States, and for that purpose do solemnly swear that I am a native born citizen of the United States; that I have made actual settlement upon and have cultivated and resided upon said lands since the ——— day of August, 1900, to the present time."

And complainant further avers that by the sworn testimony and answers of George West, one of the witnesses upon final proof of the said Wells, and given on said 26th day of May, 1902, it was by said West and by the fraudulent procurement of said Jones as in the

complaint of complainant alleged, falsely and fraudulently testified, among other things, as follows:

"Q. When did claimant settle upon the homestead, and what date did he establish actual residence thereon?

A. August, 1900—same time.

Q. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried state the fact).

A. He has lived there continuously, his wife has lived there while she was well.

Q. For what period or periods has the settler been absent from the land since making settlement, and for what purpose, and if temporarily absent did claimant's family reside upon and cultivate the land during such absence?

A. He has been off for two or three months at one time on business—at first he was unmarried, but his wife has lived on the place since except when he was off on business."

Complainant further avers: that by the sworn testimony and answers of William Teghtmeier, one of the witnesses, upon final proof of the said Wells, and given on the 26th day of May, 1902, it was by said Teghtmeier and by the fraudulent procurement of said Jones,

as in the complaint of complainant alleged falsely and fraudulently testified among other things as follows:

"Q. When did claimant settle upon the homestead and at what date did he establish actual residence thereon?

A. August 26, 1900, I think—same date.

Q. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried state the fact).

A. He is married—they have lived there continuously.

Q. For what period or periods has the settler been absent from the land since making settlement and for what purpose and if temporarily absent did claimant's family reside upon and cultivate the land during such absence?

A. No, he has never been absent."

VII.

Replying to paragraph VIII of the third further and separate amended answer of defendant complainant admits that the answers and representations of said entryman Wells in paragraph VII of said third further and separate amended answer of defendant set forth and by that portion of the final proof of said entryman Wells,

the said Wells notified and advised plaintiff that he had not been actually present upon his said land and entry in excess of the total period of ten weeks prior to defendant making such final proof and which said final proof is the homestead proof referred to in complainant's complaint, and complainant admits that complainant and its officers and agents in considering said final proof of said Wells and in issuing the final certificate and patent to said Wells referred to in said complainant's complaint knew and understood that said Wells had not been actually present upon his said homestead entry and land in excess of said total period of ten weeks and so knowing and understanding that complainant issued said certificate and patent to said Wells in said complaint mentioned, but complainant denies each and every other allegation in said paragraph contained, and further alleges that but for the said fraud so by defendant and by the said Wells and his proof witnesses practiced upon complainant as in the complaint thereof alleged, the said final certificate or patent would not have been by complainant to said Wells issued.

VIII.

Replying to paragraph I of the fourth further and separate answer of the defendant, complainant admits that each of the entrymen mentioned and referred to in paragraph II of the third further and separate amended answer herein, in making and submitting his final home-

stead proof in the complaint mentioned and referred to, personally, and each of his final proof witnesses testified, stated, and advised the plaintiff, its agents and officers, that he, the said entryman, had not resided upon the land by him entered as in the complaint described or any thereof prior to the making of his homestead or final proof in the complaint mentioned for a period of three years nor for any greater period generally than from one to one and one-half years, and in one instance (Teghtmeier) one and three-fourths years, and complainant admits that complainant and its officers and agents, in considering said homestead or final proofs and in issuing the final certificates and patents in the complaint mentioned well knew and understood that each of said entrymen had not resided upon the land by him entered in the complaint mentioned for three years prior to the making of the homestead or final proof in said complaint mentioned, nor for any greater period of time than that shown by said proof of said entrymen in each entry, and that complainant and its agents and officers, notwithstanding said knowledge and understanding, issued said certificates and patents in the complaint mentioned, but complainant denies that said certificates and patents were issued by complainant and its agents and officers by mistake or error of law; and avers that the issuance thereof was induced by the fraud heretofore alleged of defendant and said entyrmen and witnesses aforesaid; and complainant further alleges that but for the said

fraud so by defendant and by said entrymen and proof witnesses practiced upon complainant as in the complaint thereof alleged, none of said final certificates or patents would have been by complainant issued.

IX.

Replying to paragraph II of said fourth further and saparate amended answer of defendant, complainant admits that said Wells paid plaintiff for the tract consisting of 160 acres entered by him, in the complaint mentioned, the sum of two hundred forty ($240.00) dollars upon commutation of his said entry, and prior to the issuance of patent therefor as in complainant's complaint alleged, but complainant denies each and every other allegation in said paragraph contained.

X.

Replying to paragraph III of said fourth further and separate amended answer of defendant complainant admits each and every allegation therein contained and the whole thereof.

XI.

Replying to paragraph IV of said fourth further and separate amended answer of defendant, complainant denies each and every allegation therein contained, and the whole thereof.

WHEREFORE complainant demands judgment

against defendant as in complainant's complaint heretofore demanded.

EVERETT A. JOHNSON,
Assistant United States Attorney for Oregon.

United States of America,
District of Oregon—ss.

I, Everett A. Johnson, being first duly sworn depose and say that I am Assistant United States Attorney for the District of Oregon, and that I have prepared the foregoing reply and know the contents thereof, and that the allegations therein contained are true as I verily believe.

EVERETT A. JOHNSON,

Subscribed and sworn to before me this 31st day of March, 1916.

(Seal) John J. Beckman,
Notary Public for Oregon.

My commission expires February 16, 1917.

United States of America,
District of Oregon—ss.

Service of the within Reply is hereby acknowledged by acceptance of a copy thereof duly certified to as such by Everett A. Johnson, Assistant United States Attorney, this ——— day of March, 1916.

FULTON & BOWERMAN,
Of Attorneys for Defendant.

Filed March 31, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 1st day of April, 1916, there was duly filed in said Court and cause a Motion for Judgment on the pleadings, in words and figures as follows, to wit:

## MOTION FOR JUDGMENT ON THE PLEADINGS.

Comes now the defendant in the above entitled cause and said cause being at issue, moves the court for a judgment dismissing said action, for the reason that on the face of the pleadings, and under the facts alleged and admitted, it appears that the plaintiff is not entitled to recover against the defendant.

FULTON & BOWERMAN,
Attorneys for Defendant.

State of Oregon,
County of Multnomah—ss.

Due service of the within motion by the delivery of a duly certified copy thereof as provided by law, at Portland, Oregon, on this 1st day of April, 1916, is hereby admitted.

E. A. JOHNSON,
Assistant U. S. Attorney and of Attorneys for Complainant.

Filed April 1, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Saturday, the 1st day of April, 1916, the same being the 24th judicial day of the regular March, 1916, term of said court; present: the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

## JUDGMENT.

Now, at this day, come the plaintiff by Mr. Everett A. Johnson, Assistant United States Attorney and the defendant by Mr. C. W. Fulton, of counsel; whereupon this cause comes on to be heard upon the motion of said defendant for judgment upon the pleadings, and the Court having heard the arguments of counsel and being fully advised in the premises,

IT IS ORDERED that said motion be, and the same is hereby allowed and that said plaintiff take nothing by this action, and that said defendant go hence without day.

And afterwards, to wit, on the 24th day of May, 1916, there was duly filed in said Court and cause a Petition for Writ of Error, in words and figures as follows, to wit:

## PETITION FOR WRIT OF ERROR.

Comes now the complainant, United States of America, by Clarence L. Reames, United States Attorney for

Oregon, and Barnett L. Goldstein, Assistant United States Attorney for Oregon, under and by authority and direction of the Attorney General of the United States, and says that on the 1st day of April, 1916, this court entered judgment herein in favor of the defendant and against the complainant, in which judgment and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this complainant, all of which will more in detail appear from the assignment of errors which this complainant filed with this petition.

WHEREFORE, this complainant prays that a writ of error may be issued in its behalf out of the United States Circuit Court of Appeals for the ninth circuit for the correction of errors so complained of, and that a transcript of record, proceedings and papers in this cause duly authenticated may be sent to such Circuit Court of Appeals for said circuit.

CLARENCE L. REAMES,
United States Attorney.

BARNETT H. GOLDSTEIN,
Assistant United States Attorney.

Filed May 24, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 24th day of May, 1916, there was duly filed in said Court and cause, an Assignment of Errors in words and figures as follows, to wit:

## ASSIGNMENT OF ERRORS.

Comes now the United States of America, the plaintiff in the above entitled cause, appearing by Clarence L. Reames, United States Attorney, and Barnett H. Goldstein, Assistant United States Attorney for the district of Oregon, and in connection with its petition for writ of error from the judgment made and entered in said cause in this court on the 1st day of April, 1916, files this, its assignment of errors, upon which it intends to rely in the prosecution of its said writ of error:

I.

The court erred in allowing and granting defendant's motion for a judgment dismissing the above entitled cause upon the pleadings.

II.

The court erred in holding and deciding that on the face of the pleadings and upon the facts alleged and admitted the plaintiff was not entitled to recover against the defendant.

III.

The court erred in holding and deciding that the fraudulent representations made by the respective entrymen in support of their entries embracing the lands involved in said cause were immaterial.

IV.

The court erred in holding that because of an alleged

erroneous allowance by the officials of plaintiff's land department of military service in lieu of a period of actual residence, the false and fraudulent affidavits and proofs made by the homestead entrymen were immaterial, notwithstanding that such false and fraudulent affidavits and proofs were relied upon as true by officials of plaintiff's land dpartment, and if such affidavits and proofs had not been made no patents for the lands involved would have been issued.

V.

The court erred in holding and deciding that the plaintiff was not entitled to recover, when it appears from the pleadings that the homestead entries embracing the lands involved, in support of which the false and fraudulent proofs of residence were offered, were not in fact made by the respective entrymen for their own benefit, but, on the contrary, were made for the benefit of the defendant, in violation of the law.

VI.

The court erred in holding and deciding that the proof in support of the homestead entry made by John L. Wells showed that the requisite term of residence had not been maintained, and that therefore the false and fraudulent representations made by him were immaterial.

VII.

The court erred in not holding and deciding that the

homestead entries embracing the lands involved, having been made by the respective entrymen not in their own behalf or for their own benefit, but at the instigation and for the benefit of the defendant, said homestead entries were therefore illegal and fraudulent and constituted the means by which the defendant wrongfully deprived the plaintiff of its title to valuable tracts of land.

VIII.

The court erred in for any reason rendering judgment in favor of the defendant upon the pleadings.

WHEREFORE the plaintiff prays that the said judgment of the district court be in all things reversed and that such directions be given to correct the errors complained of as of right and according to law should be done.

CLARENCE L. REAMES,
United States Attorney.

BARNETT H. GOLDSTEIN,
Assistant United States Attorney.

Filed May 24, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Wednesday, the 24th day of May, 1916, the same being the 69th judicial day of the regular March, 1916, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

## ORDER ALLOWING WRIT OF ERROR.

On this 24th day of May, 1916, the above named plaintiff appearing by Barnett H. Goldstein, Assistant United States Attorney for the district of Oregon, and filing herein and presenting to the court its petition praying for an allowance of a writ of error and assignment of errors intended to be urged by it, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the ninth circuit, and that such other and further proceedings may be had as may be proper in the premises,

Now, on consideration thereof, the court does allow the writ of error as prayed in the petition of plaintiff without bond of the plaintiff, it appearing that the above entitled cause is one in which the United States of America is appellant, and is brought under and by direction of the Attorney General of the United States.

R. S. BEAN,

Judge of the District Court.

Filed May 25, 1916. G. H. Marsh, Clerk.

UNITED STATES OF AMERICA,
District of Oregon—ss.

I, G. H. MARSH, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on writ of error in the case in which the United States of America is plaintiff and plaintiff in error, and Willard N. Jones is defendant and defendant in error, in accordance with the law and rules of court and in accordance with the praecipe of said plaintiff in error, and that the said transcript is a full, true, and correct transcript of the record and proceedings had in said court in said cause in accordance with the said praecipe as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript of record is $..... for printing said transcript, and that the same has been paid by said plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Portland, in said district, this.....day of June, 1916.

Clerk.